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In the Supreme Court of the United States

OCTOBER TERM, 1977

VITO MANGO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 16-17) is not reported (see 559 F. 2d 1222).

JURISDICTION

The judgment of the court of appeals was entered on June 21, 1977. The petition for a writ of certiorari was filed on July 22, 1977, and is therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court abused its discretion in refusing to conduct a *voir dire* examination on the issue of the mental competency of a government witness and in

refusing to allow cross-examination of that witness as to whether he had ever been institutionalized due to mental illness.

2. Whether the evidence was sufficient to support petitioner's convictions on the embezzlement and racketeering counts of the indictment.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Ohio, petitioner was convicted of four counts of embezzlement (counts 3, 4, 7 and 8), one count of mail fraud (count 2), and one count of engaging in a pattern of racketeering activity (count 1), in violation of 29 U.S.C. 501(c), 18 U.S.C. 1341, and 18 U.S.C. 1962(c), respectively.[1] Petitioner was sentenced to six years' imprisonment on count one and five years' imprisonment on each of the remaining counts, all sentences to be served concurrently. The court of appeals affirmed (Pet. App. 16-17).

All of the acts alleged in the indictment occurred between April 1974 and February 1975, when petitioner was president of Local 413 of the International Brotherhood of Teamsters in Columbus, Ohio. The evidence adduced at trial, which is set out in pertinent part in more detail below, showed that on two occasions petitioner and others made unauthorized trips from Columbus to Chicago at union expense (counts 3, 4, and 8) and also that union funds were spent to purchase ballots and envelopes that were used by petitioner to fix a union election (counts 2 and 7). Based on all these incidents, as well as evidence of two other embezzlement schemes, petitioner also was convicted of engaging in a pattern of racketeering activity (count 1).

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[1]Petitioner was acquitted on two counts of embezzlement (counts 5 and 6).

ARGUMENT

1. Petitioner contends (Pet. 7-11) that the trial court erred in refusing to conduct a *voir dire* hearing to determine whether a government witness, Robert Schmidt, had once been in a mental institution; he further urges that the trial court improperly limited cross-examination of the witness on this issue.[2] Prior to trial government counsel had advised defense counsel that Schmidt had at one time been institutionalized but that government counsel did not know when this occurred, its duration, or its cause (Tr. 85). (In its brief to the court of appeals in this case (p. 18, n. 10), the government stated that it subsequently learned that Schmidt had spent two months in a state hospital in 1958 or 1959 because of a virus in the lining of his brain but that he had not been in a hospital for a mental disorder since that time.)

a. Petitioner's first claim must be assessed against the backdrop of Rule 601 of the Federal Rules of Evidence, which provides that "[e]very person is competent to be a witness except as otherwise provided in these rules." Petitioner does not claim the benefit of any other provision of the Rules governing competency and, indeed, none of them is relevant. Whatever may previously have been the federal standard for determining mental competency, "[n]o mental * * * qualifications for testifying as a witness are specified" in the new Federal Rules of Evidence (Advisory Committee Notes to Rule 601, 28 U.S.C. (Supp. V), p. 2330). As the Advisory Committee

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[2]Schmidt's testimony went only to count 2 of the indictment, on which petitioner's five-year sentence is concurrent with a six-year term on count 1 and four five-year terms on counts 3, 4, 7 and 8. Since petitioner's challenge to his conviction on these other counts is insubstantial (see pp. 6-8, *infra*), the Court properly may decline to consider the question he raises here with respect to count 2. See *Barnes* v. *United States*, 412 U.S. 837, 848 n. 16.

Notes state (*ibid.*): "Discretion is regularly exercised in favor of allowing the testimony. A witness wholly without capacity is difficult to imagine."

Schmidt's testimony is set out in the appendix to the petition (Pet. App. 26-38). It is coherent and straightforward and contains no indication that Schmidt lacked the minimum requirements to testify or that he should for any reason have been barred from testifying. Under these circumstances a competency hearing was unnecessary. Moreover, the need for a hearing to determine the competency of a witness is a matter left to the discretion of the trial court (see Pet. 8); and there is nothing here to indicate that the court abused its discretion in this regard.[3]

b. Petitioner is on no firmer ground in contending that his cross-examination of Schmidt was improperly limited.[4] As the transcript of defense counsel's cross-examination of Schmidt suggests (Tr. 92-104; Pet. App. 30-38), Schmidt had not been in any institution other than

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[3]In any event, it is plain (and petitioner does not contend otherwise) that, if a hearing had been held, Schmidt would have been adjudged competent to testify. Petitioner therefore was not prejudiced by the lack of a hearing.

[4]The record does not reveal the precise scope of the limitation, since the court's ruling was apparently made off the record and is simply referred to by petitioner's counsel at the time Schmidt was called as a witness (see Pet. App. 25). At that time petitioner asserted the right to ask Schmidt "whether [he] ha[d] ever been in a mental institution" (*ibid.*).

an ordinary hospital since 1972.[5] Petitioner certainly was not entitled, as he asserts, to inquire whether Schmidt had "ever" in his lifetime "been in a mental institution" (Pet. App. 25). The fact that a witness may at some remote time have been institutionalized does not, without more, bear upon the relevancy or competency of his testimony. Here Schmidt testified credibly and rationally, and there is otherwise nothing in the record to suggest that he suffered from a mental defect at a relevant time. Under these circumstances, there was no error in limiting the scope of cross-examination.

In any event, Schmidt's testimony, which concerned only count 2 of the indictment, was substantially cumulative of other evidence in the government's case. As to count 2, which charged petitioner with mail fraud in the conduct of a union vote, the government relied primarily upon the testimony of Michael Mann, the office manager of the local union, who testified that he ordered the blank ballots and reply envelopes from the printer, marked the ballots and put them in envelopes during the meeting at petitioner's house, mailed the envelopes to union headquarters, and later burned the reply envelopes.

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[5]Schmidt had been in a truck accident in 1972 and did not work during most of the following year, during which time he lived with his father. At the time of the union election, Schmidt said he was working regularly, and, about that time, he moved from his father's apartment, where he had been convalescing from his second operation, to his own apartment (Tr. 95-96).

During cross-examination defense counsel questioned Schmidt about the witness' drinking prior to and during the night when the ballots were marked at petitioner's home (Tr. 97-102), and about allegedly inconsistent statements the witness had made before the grand jury and in a union proceeding (Tr. 98, 100-104). In short, petitioner's counsel was permitted to engage in a thoroughgoing attempt to impeach Schmidt's testimony.

all on petitioner's orders (Tr. 7-13). The printer also testified concerning the printing of the additional ballots and envelopes (Tr. 61-73). Schmidt's testimony[6] served only as partial corroboration of what the other two witnesses had already said. Thus, if the trial court's refusal to permit cross-examination concerning Schmidt's incident of mental disorder 18 years earlier was error, it was hardly prejudicial error.

2. Petitioner challenges the sufficiency of the evidence in regard to the embezzlement and racketeering counts (Pet. 12-14). This argument also is without merit.

To prove two of the embezzlement counts (3 and 8), the government presented evidence that petitioner, without proper authorization, billed the union for a round-trip flight to Chicago for petitioner, a union vice-president, and two female companions. The foursome attended a concert and ate two meals in the company of a Chicago man who did business with the union. But no business matters were discussed (Tr. 113, 129-130, 138), and the foursome flew back to Columbus the morning after the concert.

With respect to count 4, the evidence showed that petitioner and his private secretary, Wilma Lannan, made an unauthorized trip to Chicago that was paid for with union funds. Petitioner instructed Lannan to use union credit cards to purchase two airplane tickets, one under his name and the other under the name of J. Perkins, a

[6]Schmidt, a member of the local union and a long time friend of petitioner's (Tr. 87-88), testified on direct examination that he went to petitioner's home in February 1975 and spent the night there working under petitioner's direction marking false election ballots and putting the ballots into envelopes (Tr. 88-92). He also testified that he heard petitioner order others to mail the ballots from various locations to the union headquarters in Columbus (Tr. 91-92).

business agent for the union. The secretary obtained the tickets in this manner and took the trip to Chicago under the assumed name (Tr. 144-146, 156, 168). She stayed with petitioner in Chicago, conducted no union business, and did not observe petitioner conduct any union business there (Tr. 147-148).

A fourth count of embezzlement (count 7) charged petitioner with using union money to buy the ballots and envelopes to rig the union election. Petitioner's claim that the printer merely "overcharged" the union (Pet. 14) was fully answered by the testimony of the printer (Tr. 63-64) and of the union's business manager, who ordered the additional ballots and envelopes on petitioner's instructions (Tr. 10).

The evidence on these four counts was more than adequate to support the jury's verdict. Moreover, these four instances of embezzlement, the mail fraud, and the evidence adduced in regard to counts 5 and 6,[7] are more than sufficient to constitute a "pattern of racketeering activity" (count 1). *United States* v. *Parness*, 503 F. 2d 430, 438 (C.A. 2), certiorari denied, 419 U.S. 1105. "Racketeering activity" as defined in 18 U.S.C. 1961(1)(B) and (C) specifically includes violations of 18 U.S.C. 1341 (mail fraud) and acts indictable under 29 U.S.C. 501(c) (embezzlement of union funds). In a narrow sense, the

[7]Although the jury acquitted petitioner on counts 5 and 6, this evidence could properly be considered by the jury in convicting petitioner on the racketeering count. See *United States* v. *Rowan*, 518 F. 2d 685, 698 (C.A. 6), certiorari denied, 423 U.S. 949. Count 5 charged that petitioner took a kickback from a tire salesman who sold a large number of tires to the union (Tr. 172-174). Count 6 alleged that he stole $1,500 of insurance proceeds, which he returned to the union when the shortage was discovered (Tr. 13-17).

three counts concerning petitioner's trips to Chicago are clearly related and would be sufficient to constitute a "pattern," as would the two counts concerning the election fraud. In a broader sense, all the counts show a pattern of criminal activity over an 11-month period involving petitioner's unauthorized conversion of union funds. Cf. *United States* v. *Parness, supra,* 503 F. 2d at 438; *United States* v. *Moeller,* 402 F. Supp. 49, 58 (D. Conn.).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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